In The

Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-953

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GEORGE ROBERT HOBBS, ET AL.,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

—o—

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The petitioners, George Robert Hobbs, Michael G. Milazzo, Shawnee L. Elmore, and Jacqueline D. Davis, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Appellate Court for the State of Illinois, Second District, entered in this proceeding on May 8, 1978.

OPINION BELOW

The opinion of the Appellate Court for the State of Illinois, Second District, is reported at 59 Ill. App. 3d 793, 375 N. E. 2d 1367 (1978). A copy of the opinion is included in the Appendix as Exhibit A.

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JURISDICTION

Each one of petitioners' cases arises under the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, under which each petitioner was charged by complaint or information. Each petitioner filed a pre-trial motion to dismiss, asserting that said statute was unconstitutional, in violation of constitutional rights afforded them by the First and Fourteenth Amendments to the Constitution of the United States. Petitioners likewise filed pre-trial and trial motions asserting the constitutional invalidity of a search and seizure which took place at two bookstores in Rockford, Illinois, in February, 1976. All of these motions were denied. After jury trials in Winnebago County Circuit Court, each petitioner was found guilty of obscenity, petitioners Hobbs, Milazzo and Elmore on July 15, 1976, and petitioner Davis on September 16, 1976. Post-trial motions raising the aforesaid constitutional issues were denied. Each petitioner was sentenced to 90 days in jail and fined $1,000.

Timely appeals were prosecuted to the Illinois Appellate Court, Second District, where petitioners' cases were consolidated. The petitioners' convictions were affirmed and their assertions regarding the Illinois Obscenity Statute and the search and seizure were rejected. *People v. Hobbs,* 59 Ill. App. 3d 793, 375 N. E. 2d 1367 (1978). A timely petition for rehearing was denied on June 6, 1978. A copy of the order denying rehearing is included in the Appendix as Exhibit B.

Petitioners sought leave to appeal from the Illinois Supreme Court in a timely fashion. On September 28, 1978, the Illinois Supreme Court denied their petition for leave to appeal. A copy of the order denying leave to appeal is included in the Appendix as Exhibit C.

Jurisdiction of the United States Supreme Court to review the decision of the Illinois Appellate Court, Second District, by petition for writ of certiorari is conferred by 28 U. S. C. § 1257 (3).

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QUESTIONS PRESENTED

1. Whether the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, and the constitutional test for obscenity pronounced in *Miller v. California,* 413 U. S. 15 (1973), on which the statute stands, are so vague and indefinite that they violate petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the seizure of business equipment beyond the authority of the search warrant infringed petitioners' rights under the First, Fourth and Fourteenth Amendments to the Constitution of the United States,

rendering the search warrant, and the entire search and seizure conducted thereunder, void and invalid.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth and Fourteenth Amendments to the United States Constitution and the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, are set forth in the Appendix as Exhibit D.

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STATEMENT OF THE CASE

Petitioners were all employees of bookstores in Rockford, Illinois. In February, 1976, Rockford City Police Officers executed search warrants at each of the two stores, calling for the seizure of two specific films by each warrant in each store. Notwithstanding the limited command of the warrant, the executing officers seized monies, business records, a cash register, movie projectors, and other miscellaneous business items, resulting in closure. Petitioners were each arrested at the time of the execution of the search warrant and were charged with violating the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, with respect to the specifically named films seized pursuant to the search warrants.

Petitioners Hobbs, Milazzo and Elmore were charged by complaint and information with having made available two allegedly obscene 8 mm. films entitled "California Dreaming" and "Sweetheart," with knowledge of the nature or content, or recklessly failing to exercise reasonable inspection. The events surrounding these charges took place at 322 East State Street, Rockford, Illinois.

Petitioner Davis was identically charged with obscenity, but with respect to 8 mm. films entitled "Deep Throat II" and "Raped and Abused." The location for this charge was 615 7th Street, Rockford, Illinois.

Both Rockford bookstore locations were adult bookstores, offering for sale and viewing sexually explicit books, magazines and films. Each store restricted admittance to adults, had vision-obscured windows and doors, and displayed signs clearly indicating the adult nature of the material available. Each store included a coin-operated motion picture arcade where sexually explicit 8 mm. films were available for viewing in individual booths upon the deposit of 25-cent coins.

Pre-trial, trial and post-trial motions asserting the constitutional invalidity of the Illinois Obscenity Statute, and the constitutional impropriety of the excessive search and seizure were denied. The Winnebago County trial court refused to invalidate the search warrants used at the two bookstores, instead ruling that the items seized in excess of the authority of the warrant must be returned. Petitioners were convicted after jury trials, and each received a sentence of 90 days in jail, and a $1,000 fine. Each petitioner appealed to the Appellate Court for

the State of Illinois, Second District, where the cases were consolidated for appeal.

In the Second District Appellate Court, petitioners attacked not only the Illinois Obscenity Statute, but also the constitutional test for obscenity announced by the United States Supreme Court in *Miller v. California,* 413 U. S. 15 (1973). Petitioners also argued the constitutional invalidity of the excessive seizures beyond the command of the search warrant. Each argument was rejected by the appellate court.

The appellate court held that the petitioners' contentions regarding the Illinois Obscenity Statute were rendered non-meritorious by the decision of the United States Supreme Court in *Ward v. Illinois,* 431 U. S 767 (1977). Regarding the claimed infringement and prior restraint by the excessive seizures under the search warrant, the appellate court felt those were *"de minimis."* In so deciding, the Illinois Appellate Court remarked that the unlawfully seized items had been returned to the bookstores on the day following the searches and seizures. In a timely petition for rehearing, petitioners pointed out the clear error of the appellate court. The searches and seizures had taken place on February 27, 1976, but the items unlawfully seized were not returned until the trial court's order was entered on June 29, 1976. That petition for rehearing was denied on June 6, 1978.

Petitioners timely sought review by the Illinois Supreme Court, filing a petition for leave to appeal. The petitioners again asserted that the Illinois Obscenity Statute, and the test for obscenity announced in *Miller v. California,* 413 U. S. 15 (1978), were vague and indefinite, in

violation of petitioners' constitutional rights. Additionally, the objections regarding the search and seizure procedure were presented. Their petition for leave to appeal was denied on September 28, 1978. Each of petitioners' sentences of 90 days in jail and $1,000 fine was stayed pending review by the United States Supreme Court.

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REASONS FOR GRANTING THE WRIT

I.

The decision below utilizes and endorses the vague and unworkable concept of obscenity pronounced by this Court in Miller v. California, 413 U. S. 15 (1973).

This case presents a significant and important inquiry into the constitutional premise for the criminal regulation of allegedly obscene materials, materials which would otherwise enjoy the protection of the First Amendment to the Constitution of the United States. First Amendment considerations present a distinct category of cases to this court, e. g., *Broadrick v. Oklahoma,* 413 U. S. 601 (1973), and *Dombrowski v. Pfister,* 380 U. S. 479 (1965), and those First Amendment principles are heightened by the fair notice requirements of criminal due process under the Fourteenth Amendment. *Winters v. New York,* 333 U. S. 507 (1948).

This Court in 1973 formulated and stated a test for obscenity, a test by which materials could be measured

and adjudged not worthy of First Amendment protection. Under the guidelines announced in *Miller* by this Court, "hard core" material could be regulated by a state law under this definition:

> "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, aplying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious, literary, artistic, political. or scientific value."
>
> *Miller v. California,* 413 U. S. at 24 (citations and footnotes omitted).

That this definition was designed to answer critics' claims that the previous definitions regarding obscenity had been vague was clearly embodied in the part (b) requirement of specifically defined patently offensive sexual conduct. Indeed, this Court gave a further embellishment of that sexual conduct with two "plain examples" of a specific definition:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await

> their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra:*
>
> "(a) Patently offensive representations of descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."
>
> *Miller v. California,* 413 U. S. at 25.

Further, the *Miller* opinion emphasized the substantive limitations on prosecutions for alleged obscene material, stating:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."
>
> *Miller v. California,* 413 U. S. at 27.

One year later, the Court gave further attention to the substantive constitutional limitations on the types of sexual depictions which could be held patently offensive and, therefore, obscene. *Jenkins v. Georgia,* 418 U. S. 153 (1974). Thus, the inherent vagueness and indefiniteness of the obscenity concept was thought to be resolved by the *Miller* criteria.

However, in *Ward v. Illinois,* 431 U. S. 767 (1977), the Court was faced with an attack on a state statute

which as written contained no specificity under part (b) of the *Miller* tripartite test. Illinois decisions regarding the statute had admittedly left it open-ended. This Court was placed in a position of having to assume that the Illinois Supreme Court had provided the necessary specificity under part (b) of *Miller* and had adhered to the admonitions of *Miller* regarding fair warning to all putative defendants. This opinion in *Ward* phrased a constitutional dilemma with regard to the Illinois Obscenity Statute and answered that dilemma with its own interpretation of what the Illinois courts had and had not done, stating:

> "Because the Illinois court did not go further and expressly describe the kinds of sexual conduct intended to be referred to under part (b) of the *Miller* guidelines, the issue is whether the Illinois obscenity law is open-ended and overbroad. As we understand the Illinois Supreme Court, however, the statute is not vulnerable in this respect. That court expressly incorporated into the statute part (b) of the guidelines, which requires inquiry 'whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law'. 413 U. S., at 24, 93 S. Ct. at 2615. The Illinois court thus must have been aware of the need for specificity and of the *Miller* Court's examples explaining the reach of part (b). See *id.*, at 25, 93 S. Ct. at 2615. The Illinois court plainly intended to conform the Illinois law to part (b) of *Miller*, and there is no reason to doubt that, in incorporating the guideline as part of the law, the Illinois court intended as well to adopt the *Miller* examples, which gave substantive meaning to part (b) by indicating the kinds of materials within its reach. The alternative reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in *Miller*."
>
> *Ward v. Illinois*, 431 U. S at 775.

Most state courts and lower federal courts had taken the *Miller* opinion at face value, namely, that specificity under obscenity statutes, regarding patently offensive sexual conduct, was a constitutional requirement. Those courts held statutes without such specificity constitutionally invalid. *McCright v. Olsen*, 367 F. Supp. 937 (3-judge, D. N. D., 1973); *State v. Wedelstedt*, 213 N. W. 2d 652 (Ia., 1973); *People v. Tabron*, 544 P. 2d 372 (Col., 1976). Where specificity on a state statute was supplied through court construction, that construction was given prospective effect only. *State v. Harding*, 114 N. H. 335, 320 A. 2d 646 (1973); *State v. DeSantis*, 65 N. J. 462, 323 A. 2d 489 (1973).

Many state legislatures in response to *Miller* enacted new obscenity statutes, which modeled the *Miller* definition of obscenity. Those statutes often included under part (b) of the *Miller* test for obscenity, a definition of "sexual conduct" that closely paralleled the *Miller* examples. Ala. Crim. Code, Article 4, § 13A-12-130 et seq.; 18 Pa. Cons. Stat. Ann. § 5903 et seq.

Five years after *Miller*, confusion over what is or is not obscene, and what may or may not be regulated, persists in spite of the *Miller* pronouncement and utilization by most state courts and legislatures. A statistical review and analysis of the utilization of *Miller* across the United States has concluded that the test has had no impact towards reducing the availability and flow of hard core sexually explicit materials. *An Empirical Inquiry*

into the Effects of Miller v. California on the Control of Obscenity, 52 N. Y. U. L. Rev. 810 (1977). In pertinent part, that study concluded:

> "Despite the Court's attempts to ease the prosecutory burden in obscenity cases and contrary to contemporary observations, however, an empirical study of *Miller's* impact on obscenity prosecutions in the fifty states indicates that changes in the volume of obscenity and obscenity prosecutions have not followed the predicted course. The study shows that both the number of jurisdictions conducting obscenity prosecutions and the total number of obscenity prosecutions have declined since the Court promulgated its new standard. This reduction occurred despite a finding that the quantity and the explicitness of hard core pornography have almost universally increased. In addition, the survey shows that neither nonprosecutory nor extra-legal methods have supplanted criminal prosecution as a regulatory tool. Rather, the study indicates, prosecutors in the years since *Miller* have accorded a lowered priority to obscenity prosecutions, and communities throughout the nation have evidenced a growing tolerance of sexually explicit materials.
>
> 52 N. Y. U. L. Rev. at 858, 859.

The study observed that growing public tolerance of sexually explicit materials could explain the fact that there had not been an increase in obscenity prosecutions after *Miller,* and that materials normally thought "obscene" had sometimes been acquitted:

> "This liberalization of attitudes has in turn influenced prosecutors to handle only cases involving particularly hard core materials. Even though *Miller* permitted prosecution of *all* 'hard core pornography,' most large jurisdictions move only against a narrow range of the most explicit materials. *Many prosecutors and defense attorneys regard the public as unconcerned about obscenity in the absence of offensive intrusion on unwilling adults or availability to minors.* Moreover, there is a common feeling among law enforcement officials that prosecutions of hard core pornography only serve to heighten its appeal to a curious public."
>
> 52 N. Y. U. L. Rev. at 898-900 (footnotes omitted, emphasis added).

Repeatedly, in written judicial opinions and other case reports, the constitutional test for obscenity is criticized. The Utah Supreme Court condemned the third element of the *Miller* test, in strong language:

> "The motion picture exhibited revealed an entirely naked man and woman in various acts of sodomy (fellatio, cunnilingus, buggery) and adultery—all shown with closeup camera photography.
>
> "A more sickening, disgusting, depraved showing cannot be imagined. However, certain justices of the Supreme Court of the United States have said that before a matter can be held to be obscene, it must '. . . when taken as a whole, lacks serious literary, artistic, political, or scientific value.'
>
> "Some state judges, acting the part of sycophants, echo that doctrine. It would appear that such an argument ought only to be advanced by depraved, mentally deficient, mind-warped queers. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value to his own taste. If those judges have not the good sense and decency to resign from their position as judges, they should be removed either by impeachment or by the vote of the decent people of their constituency.

> "The ordinance involved in this case is clear and no one can be in doubt as to its meaning. It proscribes the showing of explicit sexual intercourse and nudity. It is not overly broad, nor does it run counter to any constitutional prohibition. The ordinance is valid." *Salt Lake City v. Piepenburg,* 571 P. 2d 1299 at 1299, 1300 (Utah, 1977).

The Hawaii Supreme Court viewed this Court's decision in *Ward v. Illinois* as a significant constitutional change in the second of the three *Miller* guidelines for obscenity:

> "Clearly, sexual conduct no longer needs to be 'specifically defined by the applicable state law' in order that the statute will not be regarded as unconstitutionally overbroad. This case [*Ward v. Illinois*] requires detailed consideration.
>
> * * *
>
> "Finally and significantly, the [United States Supreme] Court concluded that incorporation of the two examples into the Illinois statute satisfied the requirement that the sexual conduct be specifically defined by state law, thus importantly modifying the *Miller* mandate."
>
> *State v. Manzo,* 573 P. 2d 945 at 951 (Haw., 1977).

Indeed, even the first element of the *Miller* definition, which has held constitutional significance since 1957, has not escaped criticism. In a federal obscenity prosecution in Cleveland, Ohio, a jury acquitted because it rejected the landmark underpinnings of the definition of obscenity, namely, the "appeal to prurient interest" criterion announced in *Roth v. United States,* 354 U. S. 476 (1959). In a letter to the trial judge, the jury remarked:

> "The major problem is that we are convinced that the average person has a normal, healthy response to sex [and is incapable] of having a shameful or morbid interest in sex or excretions. Therefore, the first half of the definition of prurient interest . . . is not relevant to the average person."
>
> *Playboy,* December, 1978, at 85.

The test for obscenity and the guidance from the United States Supreme Court in this area, in general, have been the subject of dissatisfied comment. The Colorado Supreme Court criticized the current formula for obscenity in *Pierce v. City and County of Denver,* 565 P. 2d 1337 (Colo., 1977), stating:

> "The quagmire of uncertainty which surrounds the law of obscenity was not eliminated by the two latest decisions of the Supreme Court of the United States. *Ward v. Illinois,* — U. S. —, 97 S. Ct. 2085, 52 L. Ed. 2d 738 (1977), deals with the specificity required for regulation but offers no guidance here. All of this term's opinions by the United States Supreme Court on the obscenity issue have been decided by a 5-4 vote, thereby magnifying the confusion attached to the law of obscenity."
>
> *Pierce v. City and County of Denver,* 565 P. 2d at 1339, n. 5.

While the impact and utility of the *Miller* test for obscenity have achieved mixed results, at best, the market for sexually explicit materials is burgeoning. That market is huge. A recent study and profile of the pornography business estimated tremendous sales and distribution figures. *The X-Rated Economy, Forbes,* September 18, 1978, at 81.

The "intractable obscenity problem" appears more and more to be unsolvable within the proper constitutional confines of the First Amendment right to free speech

and press, and the Fourteenth Amendment criminal due process consideration for vagueness. Indeed, proper constitutional regard should focus on restricting dissemination to consenting adults only. *Ward v. Illinois,* 431 U. S. 767, 777 (Brennan, J. dissenting, 1977); *Paris Adult Theatre I v. Slaton,* 413 U. S. 49, 70 (Brennan, J. dissenting, 1973). As Justice Stevens aptly stated in his dissent in *Ward v. Illinois:*

> "One of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept. The specificity requirement as described in *Miller* held out the promise of a principled effort to respond to that argument. By abandoning that effort today, the Court withdraws the cornerstone of the *Miller* structure and, undoubtedly, hastens its ultimate downfall. Although the decision is therefore a mixed blessing, I nevertheless respectfully dissent."
>
> *Ward v. Illinois,* 431 U. S. at 782 (Stevens, J. dissenting).

Petitioners present the proper case to attack the *Miller* concept of obscenity. In their cases, the determination of obscenity with respect to the specific films was made under circumstances where there was no foisting or thrusting of the material on unwilling adults. The materials were not made available to minors. The Rockford bookstores restricted attendance to adults only, covered their storefront from public view and clearly advertised the adult nature of the materials. The 8 mm. films were available for private viewing in individual booths and required the continuous deposit of coins by adults who made the overt decision to view the films in question. In view of the confusion and criticism regarding this Court's test for obscenity, it is submitted that the Illinois Obscenity Statute is unconstituionally vague and indefinite under the circumstances of this case.

Petitioners' consolidated case has run the gauntlet from the promise of specificity set forth in *Miller* to the retraction of that promise in *Ward.* Their charges and their convictions were obtained under a vague Illinois Obscenity Statute that was constitutionally sustained under a vague constitutional definition of obscenity. A balancing of petitioners' First Amendment rights and the First Amendment rights of all persons similarly situated against the harsh and uneven impact of obscenity prosecutions leads only to the conclusion that the *Miller* test for obscenity is an unconstitutional infringement upon the First Amendment and should be rejected. This Court should grant the writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, Second District, and should reverse petitioners' convictions.

II.

The decision below conflicts with decisions of this Court condemning general search warrants.

This case presents a weighty question regarding the suppression of all the fruits of a general search. That search was conducted in a unique situation where executing officers ignored the specific command of a search warrant at each of two locations on the same day in Rockford, Illinois, and seized business equipment, including monies, projectors, a cash register, and other miscellaneous items which resulted in the closure of the two bookstores. The Appellate Court of Illinois regarded these

excessive seizures and disclosure as *"de minimus"*, resulting in a significant conflict with First and Fourth Amendment principles set forth by this Court.

In *Stanford v. Texas,* 379 U. S. 476 (1965), this Court frankly stated its condemnation against general warrants:

> "The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be* seized.' (Emphasis supplied.)
>
> "These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant."
>
> *Stanford v. Texas,* 379 U. S. at 481.

In First Amendment cases, where massive seizures of communicative materials have resulted, this Court has condemned and adjudged invalid warrants which on their face were specifically limited, yet which upon execution were utilized to seize hundreds of copies of books. *Marcus v. Search Warrants of Property, etc.,* 367 U. S. 717 (1961), and *A Quantity of Copies of Books v. State of Kansas,* 378 U. S. 205 (1964).

Lower courts have paid close heed in most instances and massive seizures of communicative materials have been condemned. *People v. Kimmel,* 34 Ill. 2d 578, 217 N. E. 2d 785 (1966); *People v. Bosco,* 56 Misc. 2d 1080, 290 N. Y. S. 2d 481 (1968); and *In Re Seizure of All Copies of Magazine Entitled "Knave",* 352 So. 2d 187 (La., 1977).

However, this case presents the unique situation where a massive seizure of communicative materials did not take place; rather, a restraint on the dissemination of and access to sexually explicit materials was imposed by the seizure of equipment needed to operate bookstores. It was virtually conceded below, and the Illinois Appellate Court acknowledged that the conduct of the executing officers in ignoring the specific command of two search warrants, each of which directed the officers to seize two specifically named films, was improper. The Winnebago County trial court likewise held the search and seizure improper, ordering return of the items seized in excess of the authority of the warrant. Yet the fruits of the warrant were not suppressed. There were not two searches here at each bookstore—one lawful and one unlawful. There was only one search at each bookstore on February 27, 1976, and that search and seizure was unlawful—a warrant with a specific command was treated as a general warrant. Other courts have recognized that the seizure of business equipment can be capable of having First Amendment impact. *Star Distributors v. Hogan,* 337 F. Supp. 1362 (S. D. N. Y., 1972); *Universal Amusements v. Vance,* 404 F. Supp. 33 (S. D. Tex., 1975), reversed *sub nom* on other grounds as *Butler v. Dexter,* 425 U. S. 262 (1976); *Porno, Inc. v. Municipal Court,* 33 Cal. App. 3d 122, 108 Cal. Rptr. 797 (1973).

The seizure of the business equipment in petitioners' cases had substantial First Amendment overtones. The extent of the restraint imposed as a result of a clear error by the appellate court must be resolved along with this case. The Illinois Appellate Court in their opinion stated that the items seized were returned the next day.

The record is clear, however, that the items were returned over four months later, and only after a court order for such return. It is inconceivable that a court would call turning a specific warrant into a general warrant *"de minimus."* The recognition of the impropriety of the search and seizure procedure presents a significant and important question for resolution by this Court. Accordingly, the writ of certiorari should be granted, the judgment of the Appellate Court of Illinois, Second District, reviewed, and petitioners' convictions reversed.

—o—

CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Appellate Court of Illinois, Second District.

Respectfully submitted,

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December, 1978

APPENDIX

EXHIBIT A

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE ROBERT HOBBS, et al., Defendants-Appellants.

Second District Nos. 77-50, 77-64, 77-65, 77-111 cons.
Judgment affirmed.

Opinion filed May 8, 1978—Rehearing denied June 6, 1978.

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APPEAL from the Circuit Court of Winnebago County; the Hon. JOHN W. NIELSEN, Judge, presiding.

Alex M. Abate, of Rockford, and J. Steven Beckett, of Reno, O'Byrne & Kepley, of Champaign, for appellants.

Daniel D. Doyle, State's Attorney, of Rockford (Phyllis J. Perko and Robert J. Anderson, both of State's Attorneys Appellate Service Commission, of counsel), for the People.

Mr. JUSTICE BOYLE delivered the opinion of the court:

The defendants, George Robert Hobbs, Shawnee L. Elmore, Michael G. Milazzo, and Jacqueline D. Davis, were convicted of obscenity in Winnebago County following jury trials, pursuant to the showing of films at two adult bookstores in Rockford, Illinois, on February 27, 1976. Each defendant was sentenced to 90 days in jail and fined $1,000 on his or her conviction.

The defendants' cases have been consolidated on appeal, and four issues are presented for review: (1)

Whether the searches and seizures conducted at these two bookstores were constitutionally permissible; (2) Whether section 11-20 of the Criminal Code of 1961 (hereinafter referred to as the Illinois Obscenity Statute) (Ill. Rev. Stat. 1975, ch. 38, par. 11-20) is constitutional; (3) Whether a jury instruction which was given over the defense's objection was proper; and (4) Whether the trial court abused its discretion in sentencing the defendants. After a review of the record and briefs, we find defendants' contentions to be without merit, and we affirm the judgments of the circuit court of Winnebago County.

On appeal no significant questions are raised concerning the testimony and events at the two trials, other than the procedures surrounding the searches and seizures of the concerned films, objections to which were raised anew by pretrial, trial and post-trial motions. Accordingly, to the extent possible, only the relevant details of the pretrial motions and events, as well as the sentencing data, will be treated in this opinion.

The following facts relate to the arrests of the defendants, Hobbs, Elmore and Milazzo. On February 26, 1976, at 3 p.m., Richard Galvanoni, a Rockford police officer, entered an adult bookstore at 322 East State Street, Rockford, Illinois, to view some films in booths located in the rear premises. He obtained $3 worth of quarters from the girl behind the counter—defendant Elmore—and used these quarters to activate coin-operated movie projectors whereby he watched two films in their entirety—one being denominated "California Dreaming" and the other "Sweethearts." On February 27, 1976, at 12:30 p.m., he returned to this same bookstore, purchased various magazines, and was again waited on by defendant Elmore. Later that day, at approximately 2 p. m., Officer Galvanoni appeared before Associate Judge John W. Nielsen and executed a complaint and affidavit for a search warrant. The complaint recited the location of the store and the particular items which might constitute evidence of the offense of obscenity, specifically the two aforementioned films. Officer Galvanoni's affidavit recited his activities on February 26, 1976, and then continued as follows:

> "That the projector in booth No. 1 contained a film entitled 'California Dreaming', and that film contained the following sexually explicit depictions:
>
> > This movie uses three nude males as actors. One scene shows two of the males simultaneously committing fellatio upon each other. Another scene depicts one of the males inserting his penis into a second male's anus. As that happens the third male places his penis in the mouth of the male whose penis is in the third male's anus. The three men change positions within this particular sexual arrangement. Near the end of the film the camera explicitly shows all three men ejaculating together after first withdrawing their penises from the assorted orifices mentioned.
>
> That the projector in booth No. 11 contained a film entitled 'Sweethearts' and that film contained the following sexually explicit depictions:
>
> > The movie begins with two clothed females unzipping the pants of and licking the penis of a prone, clothed male. The next scene shows all three participants nude and the male is simultaneously having vaginal intercourse with one girl while committing an act of cunnilingus upon the other girl. The participants change positions a number of times and one subsequent scene depicts

> the man having vaginal intercourse with one girl as that girl performs an act of cunnilingus upon the other female. Near the end of the film the camera shows the man ejaculating semen and then the two girls are shown licking the semen off his penis.
>
> That neither of the two films described above had a sound track and neither had any apparent literary, artistic, political or scientific significance, * * *."

On the basis of Officer Galvanoni's complaint and affidavit, Judge Nielsen issued a search warrant which ordered that the two films, "California Dreaming" and "Sweethearts," be seized from their booths.

At approximately 2:30 p.m. on February 27, 1976, Officer Galvanoni and other Rockford officers executed the search warrant at the above premises and seized the two films specified in the warrant. In addition, the officers also seized cash, numerous business records, four film description cards, two billboards and one film, "Hot Dog," taken from the suitcase of defendant Milazzo. At this time Hobbs, Milazzo and Elmore were arrested. Hobbs and Milazzo were charged with obscenity in regard to the two films, while Elmore was similarly charged on the basis of magazines. Subsequently Elmore was charged by information with exhibiting the films. Two other persons were also arrested at this time on obscenity charges.

The following facts relate to the arrest of defendant Davis. On February 26, 1976, Officer Richard Beishir, at approximately 3:30 p.m., entered "The Hollywood Art Store," an adult bookstore at 615 Seventh Street, Rockford, Illinois. Officer Beishir was in the store for an hour and spent approximately $6 to view certain films, in-

cluding two films in their entirety—"Rape of the Waitress" and "no known title but stars Tina Russell." Jacqueline Davis was the clerk on duty on this date and when Officer Beishir returned the next day at 12:30 p.m. to view the same films.

At approximately 2 p.m. on February 27, 1976, Officer Beishir appeared before Judge Nielsen and executed a complaint for a search warrant and supporting affidavit. This complaint for a search warrant was virtually the same as that of Officer Galvanoni, except as to the address, booth numbers and specific titles of the two films, "Rape of the Waitress" and "no known title but stars Tina Russell." Likewise, Officer Beishir's affidavit was for all practical purposes identical to that of Officer Galvanoni, except as to the time and place of his observing these films and the booth numbers. The summary of the sexually graphic depictions of each film in Officer Beishir's affidavit was equally as specific as that of Officer Galvanoni, and also, as in Officer Galvanoni's affidavit, the length of the film was not set forth.

On the basis of Officer Beishir's complaint and affidavit, Associate Judge John Nielsen issued a search warrant which ordered the seizure of the two films located in booths No. 8 and No. 7—"Rape of the Waitress" and "no known title but stars Tina Russell." Officer Beishir, with other Rockford officers, executed this warrant at 2:30 p.m. on February 27, 1976, and seized two films from booths No. 7 and No. 8—"Raped and Abused" and "Deep Throat II"—as well as the following items: five notebooks, $166.41 from the cash register, $119.75 in a green bank bag, $130 in rolled quarters, records, a projector, cash

register receipts and other miscellaneous items. Defendant Davis was arrested at this time and charged by information with the exhibition of the two films seized that day in booths No. 7 and No. 8, "Deep Throat II" and "Raped and Abused." The films specified in the warrant, "Rape of the Waitress" and "no known title but stars Tina Russell," were not located by the officers during their search of the premises.

In both cases, after pretrial motions to dismiss, suppress evidence and quash the search warrants and order the return of the items seized, the trial court suppressed and ordered the return of all matters seized beyond the authority of the warrants, except for the films, "Raped and Abused" and "Deep Throat II." Judge Nielsen further denied the defendants' constitutional attack on the Illinois Obscenity Statute (Ill. Rev. Stat. 1975, ch. 38, par. 11-20) and consolidated the obscenity charges against Hobbs, Milazzo and Elmore and the two other persons arrested at the same time. After the presentation of witnesses, various motions, jury instructions, etc., the jury found Hobbs, Milazzo and Elmore guilty of obscenity with respect to the films, "California Dreaming" and "Sweethearts." The two other defendants were acquitted. The defense submitted post-trial motions which attacked the search and seizure procedure and again questioned the validity of the Illinois Obscenity Statute and other matters. The trial court again denied these post-trial motions. A presentence report on each defendant was submitted, and following arguments of respective counsel, Hobbs, Milazzo and Elmore were sentenced to 90 days in jail and were fined $1,000 each on their convictions for obscenity.

The trial of the defendant, Davis, on the charge of obscenity with respect to the two films seized from booths No. 7 and No. 8, "Raped and Abused" and "Deep Throat II," proceeded in similar fashion. Following the presentation of witnesses, the submission of various motions and jury instructions, the jury found the defendant, Davis, guilty of obscenity as charged in the information. Defense counsel's post-trial motion on the propriety of the search and seizure and the constitutionality of the Illinois Obscenity Statute were denied by the trial court. Following the submission of a presentence report on this defendant and the arguments of counsel, defendant Davis was sentenced to 90 days in jail and fined $1,000 on her conviction for obscenity.

For purposes of appeal, the defense has presented the same arguments as to all defendants. Accordingly, unless otherwise specified, the contentions of all the defendants will be considered as a whole throughout this opinion.

Relevant to the first issue, the defendants' attack on the constitutionality of the searches and seizures is three-pronged. Defendants contend the searches and seizures were impermissible: first, that the affidavits and complaints were insufficient on their face to establish probable cause that the movies were obscene because the documents failed to specify the length of the films; second, that the seizures of business records, business equipment, money and other personal property which were not specified in the warrants thus exceeded the authority of the warrants since they operated as a *total restraint* on the operation of the two bookstores; third, that no return of the films was made to the defendants after they made the

initial claim that these were the only copies of these films and thus effectuated a total suppression of defendants' business activity.

Defendants argue that the details provided by the police officers in their affidavits of the search warrants were constitutionally insufficient to give an independent judicial officer probable cause to believe that the films involved were obscene. Defendants contend that the affidavits were deficient because they did not specify the length of the films, which, the defendants conceded at oral argument, were from five to seven minutes each. The defendants aver that absent this essential time element, the excerpted presentation of only the explicit sexual scenes in many feature movies and novels such as *Looking for Mr. Goodbar* and *Ulysses* would be obscene and justify probable cause for a judicial officer to issue a search warrant. We disagree.

1, 2 Initially, we note that what is at issue here—probable cause for a judicial officer to believe that a film is obscene—is not a mathematical equation subject to various postulates and theorems. (See concurring opinion in *United States v. Tupler* (9th Cir. 1977), 564 F. 2d 1294.) On the contrary, the test for probable cause is governed only by common sense and the practical considerations of every day life. (*United States v. Brinklow* (10th Cir. 1977), 560 F. 2d 1003.) The trial court must weigh the totality of all the facts before it, not just a single element such as time, in order to make its determination as to whether there is a sufficient quantum of evidence to justify probable cause that a film is obscene. Herein the trial court had before it the explicit, scatological, scene-by-scene score of four films which had no sound track, were operated on continuous run, coin-operated movie projectors in booths, and which were of such a nature that the trial court determined, based on these affidavits, not that they were obscene beyond a reasonable doubt, but, after focusing searchingly, that there existed *probable cause* to believe that the films in question were obscene. This certainly was a factually sufficient basis for the judge to make his own independent determination and to "focus searchingly" on the question of obscenity before the issuance of both search warrants. (*Ellwest Stereo Theatres, Inc. v. Nichols* (M. D. Fla. 1975), 403 F. Supp. 857.) Therefore it is not an essential element of an affidavit for a search warrant that the length of the film be set forth, as long as there is a sufficient factual basis contained therein for the trial judge to focus searchingly on the question of obscenity in regard to the film.

3 In conjunction with this argument, the defendants also aver that the trial judge must personally view the films in their entirety prior to his determination of probable cause and the issuance of the warrant for the seizure of the films. Defendants cite no authority precisely on this point, and we must respectfully disagree with their thesis. The court which have considered the sufficiency of search warrants in obscenity cases have uniformly determined that a trial judge does not have to view the film or book to establish probable cause for the issuance of the warrant as long as the affidavit of the individual who did view the film is specific and explicit and not merely conclusionary. (See *People v. Haskin* (1976), 55 Cal. App. 3d 231, 127 Cal. Rptr. 426; *Ellwest*

Stereo Theatres, Inc. v. Nichols (M. D. Fla. 1975), 403 F. Supp. 857; *Crecelius v. Commonwealth* (Ky. App. 1973), 502 S. W. 2d 89.) We concur with this rational approach for evaluating probable cause in obscenity cases because such a methodology permits an independent judicial officer to focus searchingly on the question of obscenity without having to traipse somewhere to view the films or book. The *reductio ad absurdum* of such good faith efforts by the trial court to personally view the films or books was amply demonstrated in the recent case, *People v. Bates* (1976), 39 Ill. App. 3d 259, 350 N. E. 2d 44, the details of which need not be reiterated here. Accordingly, it is not necessary for the trial judge to view personally the films prior to his determination of probable cause and the issuance of a warrant for the films.

Defendants' next contention is that the officers in seizing defendants' business records and equipment, money and other personal property exceeded the authority of their specific warrants and thus effectuated a prior restraint on protected first amendment activity by closing down the two stores until the next day. Defendants concede that none of the items that were improperly seized were admitted into evidence and that these improperly obtained articles were all returned the next day. Nonetheless, defendants argue that this court should demonstrate its disapproval of the officers' disregard of the terms of the specific warrant and the resultant effect on the communication of ideas by quashing and voiding the entire searches and the films validly seized under its terms. In support of this argument defendants rely primarily on *People v. Bosco* (1968), 290 N. Y. S. 2d 481, 56 Misc. 2d 1080, and *People v. Kimmel* (1966), 34 Ill. 2d

578, 217 N. E. 2d 785. We believe, however, that these cases are readily distinguishable from our factual situation.

In *Bosco,* 290 N. Y. S. 2d 481, 56 Misc. 2d 1080, the court held that the execution of a search warrant for nine allegedly obscene books within certain premises constituted a general search and was void in its entirety where the officers seized 300,000 books, of which only 60,600 were for books designated in the affidavits. In *Kimmel,* 34 Ill. 2d 578, our supreme court held that a specific search warrant which authorized the seizure of all copies of the four books it named, without the opportunity to litigate the question of obscenity, was aimed at suppression rather than at obtaining evidence where the police seized 1,500 copies of over 130 separate books and thus was an impermissible violation of first amendment freedoms which required the suppression even of the items *named* in the search warrant.

We believe the instant case does not involve the seizure of first amendment materials of the magnitude and scope illustrated in *Bosco* and *Kimmel.* Similarly, the items illegally seized outside the scope of the warrant were not protected forms of free speech in the form of films or books, but were items generally used in the operation of a business, such as cash registers, business records, projectors, etc. In addition, all of the improperly seized objects were returned the next day to the appropriate stores so that the inconvenience to the operation of these businesses was, in our opinion, *de minimis.* Thus, we find that the combination of these factors conclusively demonstrates that the activities of the officers in exceed-

ing the specific scope of the search warrants did not operate as a total restraint on the first amendment rights of the two businesses.

4 We certainly do not intend by our finding to condone the officers' actions in exceeding the scope of these search warrants which required only the seizure of specific films. In a proper case, where such actions would result in the extreme derogation of first amendments rights, this court would not hesitate to take appropriate action by suppression. However, here, the limited time period during which the businesses were closed and the nonexistent nature of the first amendment matters illegally seized lead this court to the inevitable conclusion that there was no total restraint on first amendment freedoms in this case.

The defendants next argue that the trial court erred in failing to order the return of the films seized under the warrants upon defendants' request and assertion that the defendants had only a single copy of these films at their disposal. Defendants aver that the trial court's refusal to order this return of these films constituted a prior restraint on their first amendment rights of expression to show these films. Basically, defendants' contentions are two-fold: First, that the defense, in a pretrial claim of suppression of the only copy of a film, need only make a showing that this is its only copy to permit the copying of the film; and secondly, defendants assert that if a requisite showing is proved to be called for, then the State has the burden to demonstrate that more than one copy exists. The State, in rebuttal, contends that there was not a total suppression of the films herein because the defense neither presented any evidence in support of this contention nor requested the opportunity to copy the

seized films as permitted under the rationale of *Heller v. New York* (1973), 413 U. S. 483, 37 L. Ed. 2d 745, 93 S. Ct. 2789. The State also points out that the defendants did not avail themselves of statutory adversary hearings (Ill. Rev. Stat. 1975, ch. 38, par. 108-12) whereby the obscene nature of these films, if any, could have been determined after their seizure.

5 Our determination of this question is governed by the sound principles expressed in *Heller v. New York,* 413 U. S. 483, 492-93, 37 L. Ed. 2d 745, 754, 93 S. Ct. 2789, 2795, wherein the court stated that:

> "* * * on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned."

We believe the seizure of the films herein, as previously stated, was constitutionally permissible pursuant to a valid search warrant. The defendants did not properly request an adversary proceeding on the question of the obscenity of the films as provided in section 108-12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1975, ch. 38, par. 102-12), which would have permitted a prompt return of the films if they had been determined not to be obscene. Nevertheless, we believe the defendants have the burden initially to demonstrate to the trial court that other copies of the films are not available. This clearly is not an unreasonable burden and could be established by, among other methods, the testimony of the owners or defendants. Thus, the real question becomes whether the defendants have made a proper showing in this cause that

other copies of these films were not available to them, which would have required the trial court to permit the films to be copied or returned under the *Heller* rationale. Our perusal of this record conclusively proves that the defendants have not properly circumstantiated the fact that these films were the only copies available to the defendants. There was no evidence brought before the trial court on this matter, and even defense counsel's own reference to this matter is equivocal and sophistical in that the most he stated was:

> "[*E*]*ven if assuming that there were other copies of the film* available and we allege that—I belive that I can state to the court, although there is no evidence we have a showing and the State has made no showing. I don't know who has burden to make the showing and the State has made no showing. *Even if we had another copy of the film,* they took the projector, too, so that not only can that film not be shown on that projector but other films—Gone With the Wind, Mickey Mouse cartoons—that the court would readily admit is not affected by obscenity statutes can't be shown either." (Emphasis added.)

These comments are not sufficient to establish that these films were the only copies available to the defendants absent more proof. Accordingly, under these circumstances, we find that the refusal of the trial court to order the return of these films was not a prior restraint on the defendants' first amendment rights of expression to show these films.

Defendants next contend that People's Instruction No. 13—a non-Illinois Pattern Jury Instruction which was offered by the State at trial to both juries—was improper and should not have been given over the defendants' objection. The contested instruction reads as follows:

> "The State is not required to produce expert testimony on the question of whether or not the films are obscene."

The defense concedes that this instruction properly states the law expressed in *People v. Ridens* (1972), 51 Ill. 2d 410, 282 N. E. 2d 691, but nevertheless argues that this instruction was misleading and confusing to the juries on a matter which was not at issue. The State, in rebuttal, avers that the defendants have waived this issue on appeal because they did not properly preserve it in their post-trial motions. Alternatively, the State contends that this instruction was properly given by the trial court to both juries and that a review of all the instructions given here demonstrates that the juries were properly instructed that the *State* had the burden of proving these defendants guilty beyond a reasonable doubt.

6-8 We are in agreement with the State that the defendants have not properly preserved this issue in their post-trial motions as required by Supreme Court Rule 615 (a) (Ill. Rev. Stat. 1975, ch. 110A, par. 615 (a)) and that they have accordingly waived this issue for purposes of appeal. The evidence, in our opinion, conclusively establishes the defendants' guilt beyond a reasonable doubt, and this instruction in no way deprived the defendants of a fair and impartial trial, and, hence, the defendants have waived the consideration of this contention as grounds for reversal. (*People v. Pickett* (1973), 54 Ill. 2d 280, 296 N. E. 2d 856.) However, assuming arguendo that this issue was properly preserved in the trial court, we find no error in the trial court's properly instructing the juries that the State is not required to produce expert testimony concerning whether the films are obscene. Cer-

tainly, this is a correct statement of the law as enunciated by our supreme court in *People v. Ridens,* 51 Ill. 2d 410, and it is the trial court's duty, in our judge-and-jury system, to instruct the jury as to the proper status of the law. (*People v. Jenkins* (1977), 69 Ill. 2d 61, 370 N. E. 2d 532.) Additionally, the scatologic nature of this literature in relation to other jurisdictions was an issue raised by the defendants' own pornographic "expert" and was a proper subject for a jury instruction. Accordingly, it was not error for the trial court to give this instruction to the juries.

Defendants next contend that the Illinois Obscenity Statute (Ill. Rev. Stat. 1975, ch. 38, par. 11-20) is unconstitutional because it does not meet the specific requirements of the part (b) test of *Miller v. California* (1973), 413 U. S. 15, 24, 37 L. Ed. 2d 419, 431, 93 S. Ct. 2607, 2615, *rehearing denied* (1973), 414 U. S. 881, 38 L. Ed. 2d 128, 94 S. Ct. 26, as to "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [obscenity] law." However, this contention is entirely devoid of merit in light of the Supreme Court's determination in *Ward v. Illinois* (1977), 431 U. S. 767, 52 L. Ed. 2d 738, 97 S. Ct. 2085, that the Illinois Obscenity Statute was not unconstitutionally overbroad because it failed to state specifically what sexual actions would be patently offensive and obscene under this statute. The court further found that the Illinois Supreme Court had specifically incorporated requirement (b) of *Miller,* 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, as to specificity, as well as having adopted the *Miller* explanatory examples of what constitutes patently offensive descriptions or representations of ultimate explicit sexual acts, which need not be repeated here. In accordance with these views and standards expressed in *Ward,* we similarly hold that the Illinois Obscenity Statute (Ill. Rev. Stat. 1975, ch. 38, par. 11-20) is constitutional and we reject defendants' contentions to the contrary.

Finally, the defense contends that the trial court abused its discretion in sentencing each of the defendants to 90 days and fining each of them $1,000 in light of their exemplary records. Additionally, the defendants point to various colloquies between the trial court and the prosecutor during which both parties expressed a desire to impose a sentence and fine which would be a deterrent to others who might consider working in such establishments as further grounds that the trial court abused its discretion. The State asserts in rebuttal that these sentences and fines were statutorily mandated because to grant probation for these types of offenses "would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice." Ill. Rev. Stat. 1975, ch. 38, par. 1005-6-1 (a) (3).

9 Our supreme court recently reiterated the long-standing principle that the trial court's exercise of judicial discretion in imposing sentence will not be disturbed on appeal absent an abuse of such discretion. (*People v. Perruquet* (1977), 68 Ill. 2d 149, 368 N. E. 2d 882.) In addition, our supreme court in *People v. Waud* (1977), 69 Ill. 2d 588, 373 N. E. 2d 1, held that the trial court had not acted arbitrarily in refusing to grant probation to a defendant because the sentencing court believed the im-

position of probation would have deprecated the seriousness, nature and extent of the crimes. In *Waud,* 69 Ill. 2d 588, 595-96, the court stated:

> "A crime need not be one of violence before it can be considered serious. The facts that a defendant has led a good life prior to his or her shortcomings and is not likely to repeat his or her failures again are factors to be considered by the trial court, but they are not conclusive factors. The State does not have a burden of producing empirical data to support the trial court's conclusion that probation will deprecate the seriousness of the offense. The court may reach such determination by examining all of the surrounding circumstances and drawing the reasonable inferences therefrom."

We have examined the complete record and considered the nature of these offenses, and we have determined that the trial court did not abuse its discretion in considering the above factor, among others, in the imposition of these sentences and fines which clearly were within the statutory limitations (Ill. Rev. Stat. 1975, ch. 38, par. 1005-8-3 (1) for these defendants who were convicted of Class A misdemeanors. Ill. Rev. Stat. 1975, ch. 38, par. 11-20 (d).

The judgment of the circuit court of Winnebago County is affirmed as to all the defendants.

Judgments affirmed.

SEIDENFELD, P. J., and RECHENMACHER, J., concur.

EXHIBIT B

Office of the Clerk
312-695-3750

SEAL

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT

Elgin, Illinois 60120

June 6, 1978

The Court has this day entered the following order in the case of:

Gen. No. 77-50) Cons.
77-64)
77-65)
77-111) Cases

People of the State of Illinois,

Appellee,

v.

George Robert Hobbs, Shawnee L. Elmore,
Michael G. Milazzo, Jacqueline Davis,

Appellants.

Petition for rehearing by appellants, denied.

LOREN J. STROTZ
Clerk

Alex M. Abate
J. Steven Beckett
Daniel D. Doyle
Phyllis J. Perko
Robert J. Anderson
Reno, O'Byrne & Kepley

EXHIBIT C

ILLINOIS SUPREME COURT
CLELL L. WOODS, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

September 28, 1978

Mr. J. Steven Beckett
Attorney at Law
Reno, O'Byrne & Kepley
501 West Church St.
Champaign, Ill. 61820

No. 50912—People State of Illinois, respondent, vs. George Robert Hobbs, et al., petitioners. Leave to appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

EXHIBIT D

First Amendment Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Fourth Amendment
Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment Constitution
of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 38—Criminal Law and Procedure 38 § 11-21

11-20 § 11-20. *Obscenity.* (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social imporance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the

possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P. A. 77-2638, § 1, eff. Jan. 1, 1973.